Petition

81-1215

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No. 81

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

M. B. SCHNAPPER, et al.

Petitioners,

v.

WILLIAM E. FOLEY, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

SEYMOUR S. GUTHMAN
1000 Vermont Avenue, N.W.
Washington, D.C. 20005
202-347-1755

Questions Presented

1. Does the First Amendment permit, or the Copyright Clause authorize, the copyrighting of books, films, or other works prepared for, and at the expense of, the United States?

2. Does section 105 of the 1976 Copyright Act, 17 U.S.C. §105, authorize the copyrighting of books, films, or other works prepared for, and at the expense of, the United States?

3. Did section 8 of the 1909 Copyright Act, 17 U.S.C. §8 (1970), authorize the copyrighting of books, films, or other works prepared for, and at the expense of, the United States?

Parties to The Proceedings in The Court of Appeals

The parties to the proceedings in the court of appeals were as follows:

(1) Plaintiff M. B. Schnapper.

(2) Defendant William E. Foley, Director of the Administrative Office of the United States Courts.

(3) Defendant David Ladd, Register of Copyrights.

(4) Defendant Public Broadcasting Service.

(5) Defendant Metropolitan Pittsburgh Public Broadcasting, Inc., owner and operator of television station WQED.

(6) Defendant Greater Washington Area Educational Telecommunications Association, Inc., owner and operator of television station WETA.

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceedings in the Court of Appeals i

Opinions Below 1

Jurisdiction 2

Statutes and Constitutional Provisions Involved 2

Statement of the Case 3

Reasons for Granting the Writ 5

Conclusion 10

APPENDIX

Decision of the Court of Appeals, dated October 1, 1981 ..... 1A

Decision of the District Court, dated July 9, 1979 ..... 28A

TABLE OF AUTHORITIES

Cases

Page

Banks v. Manchester, 128 U.S. 244 (1888) 7

Forsham v. Harris, 445 U.S. 169 (1980) 5

Graham v. John Deere Co., 338 U.S. 1 (1966) 9

New York Times v. United States,
403 U.S. 713 (1971) 6, 9

Wheaton v. Peters, 8 Pet. (33 U.S.) 591 (1834) 6

Statutes

5 U.S.C. § 702 4

17 U.S.C. § 506 6

28 U.S.C. § 1254 (1) 2

Copyright Act of 1909, § 8, 17
U.S.C. § 8 (1970) 2, 4, 9

Copyright Act of 1976, § 105,
17 U.S.C. § 105 (Supp. I 1970) 2, 4

Other

United States Constitution, Article I, Section 8 ..... 2, 8

S. Rep. 1473, 56th Cong., 1st Sess. 10

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M. B. SCHNAPPER, et al.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Petitioner M. B. Schnapper prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding.

Opinions Below

The decision of the Court of Appeals, which is not yet officially reported, is set out at pp. 1A-27A of the Appendix.

The decision of the United States District Court for the District of Columbia is reported at 471 F. Supp. 426 (D.D.C. 1979), and is set out at pp. 28A-32A of the Appendix.

Jurisdiction

The opinion of the Court of Appeals for the District of Columbia Circuit was entered on October 1, 1981. Jurisdiction in this Court is invoked pursuant to 28 U. S. C. § 1254(1).

Statutes and Constitutional Provision Involved

Section 8 of the 1909 Copyright Act, 17 U.S.C. § 8 (1970), provides in pertinent part:

> No copyright shall subsist . . . in any publication of the United States.

Section 105 of the 1976 Copyright Act 17 U. S. C. § 105 (1977) provides:

> Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

Section 8 of Article I of the United States Constitution authorizes Congress:

> To promote the Progress of Science and the Useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

Statement of the Case

Petitioner M. B. Schnapper filed this action on December 13, 1977 in the United States District Court for the District of Columbia, challenging a variety of related practices concerning the production of films, books, and

other works by federal contractors. The immediate focus of the complaint was a series of films about the United States Supreme Court produced in 1976 by Station WQED, a public television station in Pittsburgh. These films, collectively entitled "Equal Justice Under Law", were commissioned by, controlled by, and paid for by the Judicial Conference of the United States with funds appropriated by Congress. The films were subsequently distributed by the Public Broadcasting System to its affiliated stations, including WETA in Washington, D.C., and were broadcast by some of these stations.

The Amended Complaint asserted several distinct claims. First, it alleged that the contract for the films had authorized the firm producing the films to copyright them and that such a copyright in a work produced for and at the expense of the United States was both unlawful and unconstitutional. Second, it claimed that the contract sought to evade the statutory and constitutional prohibition against copyrighting materials by the United States by directing the contractor to copyright the films in its own name and to then assign the copyright to the government. Third, it alleged that federal officials had exercised comprehensive control over the content of these films broadcast over public television; such covert control was claimed to have misled the public and to have violated the First Amendment, laws and public policy of the United States. Fourth, it asserted that by conveying copyright of the films to a private party the federal officials had acted in violation of the Constitution's Government Property Clause.

The Amended Complaint was filed as a class action on behalf of all persons who watch television broadcasts by Station WETA, and of all persons whose access to works produced at the government's expense would be

limited or restricted by the disputed copyrights. It alleged that the defendant government and public television officials had engaged in a pattern and practice of similar activities. It sought a variety of forms of relief, including invalidation of the copyright in the disputed films and an order prohibiting the registration of similar copyrights in the future.

The federal defendants moved to dismiss the complaint arguing that the facts alleged, even if true, involved no unconstitutional or unlawful action. The United States also attacked the standing of the plaintiffs and the ripeness of the asserted claims. Plaintiffs moved for certification of the class. On June 9, 1979, the District court dismissed the complaint for failure to state a claim on which relief could be granted; it did not address the standing and ripeness arguments asserted by the government. The lower court did not rule on the pending motion for class certification.

While the case was pending in the court of appeals two further developments occurred. First, on March 22, 1980, the United States and WQED entered into an amended contract pursuant to which the government relinquished to WQED its right to the disputed copyright. Second, at oral argument counsel for both the federal defendants and WETA stated that they no longer opposed petitioner's request to use the films. However, WQED, which now held the copyright, declined to consent to such use.

The court of appeals held that the federal defendants were subject to suit for injunctive relief under 5 U.S.C. § 702, but rejected on the merits each of petitioner's claims. It concluded that both the 1909 and 1976 copyright acts authorized the United States to require federal contractors and grantees to copyright works produced

with federal funds and to assign those copyrights to the government or its officials. The court of appeals further held that neither the First Amendment, nor any limitation in the Copyright Clause, prevented the United States from enjoining or prosecuting anyone seeking to publish copyrighted materials generated with federal funds.

Reasons for Granting the Writ

This is the second case in less than two years to come before this Court regarding the control and use of the millions of documents and other materials prepared with government funds by federal contractors and grantees. In *Forsham v. Harris*, 445 U.S. 169 (1980), the Court held that the Freedom of Information Act could not ordinarily be used to compel disclosure of such materials so long as they remained solely in the possession of the private contractor or grant recipient. In the instant case, where a substantial number of copies of the disputed films have from the outset been in the hands of federal officials, the government seeks a radical extension of *Forsham*, arguing that it can use the Copyright Act to forbid reproduction or publication of such works produced at taxpayers' expense. By expressly sustaining this extraordinary contention, the court of appeals gave to federal officials a dangerous and unprecedented power to control the dissemination of information about government activities.

The magnitude of the impact of the decision below is difficult to overstate. As this Court noted in *Forsham*, more than 55 *million* documents have been generated by recipients of federal grants. 445 U.S. at 181. Additional millions of documents, films and other works have been produced for the United States by federal contractors.

A considerable portion of all federal activities is now conducted by grantees and contractors, rather than by regular federal employees. Billions of dollars are spent in this way annually on research, information services, and various other government undertakings. The decision of the Court of Appeals means that every document prepared by such grantees and contractors, including letters to federal officials and reports of how government funds were spent, may be protected by copyright and shielded from public scrutiny.

The danger posed by such copyright control is gravely enhanced by two critical features of the 1976 Copyright Act. First, the possible maximum penalty for copyright infringement has been increased to $10,000 and one year in jail. 17 U.S.C. § 506 (Supp. I 1977). Second, a document or other work need no longer be published or filed with the Copyright Office in order to be protected by copyright. Thus severe sanctions are now attached to the unauthorized use of materials which have never been published and which the contractor or grantee desires to suppress.

This Court has repeatedly recognized the danger that copyright might be used to frustrate the purposes of the First Amendment. In *New York Times v. United States*, 403 U.S. 713 (1971), Chief Justice Burger warned that copyright could "afford . . . a protection analogous to prior restraint," 403 U.S. at 750. Justices White and Stewart emphasized the importance of distinguishing private enforcement of a private copyright "from the Government's request for an injunction against publishing information about the affairs of government," 403 U.S. at 731, n. 1. This Court has twice rejected attempts to copyright materials prepared with public funds. *Wheaton v. Peters*, 8 Pet. (33 U.S.) 591 (1834), unanimously held

that the members of this Court did not have, and could not confer on anyone, a copyright in the "opinions delivered by this court." 8 Pet. at 667. *Banks v. Manchester*, 128 U.S. 244 (1888), held that a state court reporter could not, even with the authority of that court, copyright its opinions. 128 U.S. 246.

The decision in *Banks* was not based on any language in the copyright act itself, but on the rationale which underlies and thus limits the power of Congress under the Copyright Clause. The Court recognized that the authority to confer copyrights, and the attendant power to enjoin or punish pure and truthful speech that would ordinarily be protected by the First Amendment, exists only to provide an assurance of financial reward to writers and producers of written and other works. Thus *Banks* held:

> Judges, as is well understood, receive from the public treasury a stated annual salary, fixed by law, and can themselves have no pecuniary interest or proprietorship, as against the public at large, in the fruits of their judicial labors . . . The whole work done by judges . . . is free for publication to all. 128 U.S. at 253.

In this case, as in *Banks*, the television station which produced "Equal Justice Under Law," is not dependent on a copyright for financial reward for its labors. It was fully and adequately compensated for its work from the public treasury. And since, under the original contract here, it was a federal agency, not WQED, that was to hold the copyright, the purpose of copyrighting the films was clearly not to provide such a financial reward.

In this case the court of appeals held, not merely that contractors and grantees were at liberty to exercise copyright control over federally funded works, but that the

United States could *require* its grantees and contractors to obtain such copyrights and direct them to assign them to a federal agency or official. This decision authorizes federal officials to obtain direct copyright control over the publication and use of literally millions of federally funded documents and other materials. By means of such a copyright "kickback" the United States is given the power to decide what documents or other works may be made available to the public, and to punish by fine or imprisonment anyone who publishes materials the government prefers to keep secret.

The arbitrariness with which this extraordinary power can be used is well illustrated by the facts of this case. After this case was filed in 1977, petitioner made repeated but unsuccessful efforts to persuade the United States to allow him to use the disputed films. After the litigation was over three years old the government suddenly announced at oral argument in the court of appeals that it no longer opposed petitioner's request, See App. 3A. This waiver was legally irrelevant, however, because prior to oral argument the federal defendants had assigned the right to the copyright back to WQED. Why the government for three years found petitioner's request objectionable, and then found it entirely acceptable, remain, so far as can be discovered from the record, a mystery.

The court of appeals' decision upholding the disputed copyright rests on reasoning whose application reaches far beyond this case. The court held that the language of section 8 of Article I of the Constitution, which states that the purpose of patents and copyrights is "[t]o promote the Progress of Science and the Useful arts," in no way limits the use of patents and copyrights to cases in which they would in fact achieve that goal. App. 8A.

The court's opinion places it within the power of Congress to authorize federal employees to copyright rules, regulations, or memoranda written as part of their official duties. This holding is squarely in conflict with the decision of this Court in *Graham v. John Deere Co.*, 383 U.S. 1, 5-6 (1966), that the language of section 8 is "both a grant of power and a limitation" which establishes a constitutional "standard" by which both acts of Congress and particular patents or copyrights must be measured.

The court of appeals also held that plaintiff, who faces criminal prosecution or an action for damages if he attempts to show the disputed films or publish their contents, is without standing under the First Amendment to object to the copyright involved. App. 17A-20A. The court reasoned that only those who have not seen or read a work have standing to object to its suppression, and that a publisher loses any cognizable First Amendment claim once he or she has personal access to the material involved. Under the court's decision only listeners, not speakers, are protected by the constitutional guarantee of free speech. This rule, masquerading as a standing criteria, virtually strips the First Amendment of meaning; it is certainly contrary to this Court's decision that the New York Times, which already had possession of the Pentagon Papers, had a constitutionally protected right to distribute them to others. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

The action of the court of appeals in reaching and deciding these important and difficult constitutional issues followed from a palpably erroneous construction of the statute involved. The 1909 Copyright Act, which controls the copyright of the disputed films, App. 8A, forbids copyrighting of "any publication of the United States

Government." The broad language of this provision contains no hint of an exception for works paid for, ordered by and controlled by the United States Government merely because the party who actually prepared it happened to be a government contractor rather than a federal employee. On the contrary, the Senate report explaining this statutory prohibition explained that it "was intended to cover every publication authorized by Congress in all possible forms." S. Rep. 1473, 56th Cong., 1st Sess., p. 2. Clearly the films at issue in this case are such a "publication."

Conclusion

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia.

Respectfully submitted,

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APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1848

M. B. SCHNAPPER
PUBLIC AFFAIRS PRESS
(A corporation of the State of Delaware), APPELLANTS

v.

WILLIAM E. FOLEY, Director
Administrative Office of the
U.S. Courts of the Supreme Court, et al.

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 77-2119)

Argued January 27, 1981
Decided October 1, 1981

Judgment entered this date

Eric Schnapper with whom *Seymour S. Guthman* and *George R. Douglas, Jr.*, were on the brief for appellants.

Thomas J. Byrnes, Attorney, Department of Justice with whom *Charles F. C. Ruff*, United States Attorney and *Alice Daniel*, Assistant Attorney General were on the brief for appellees, Foley and Ringer.

Theodore D. Frank with whom *Mania K. Baghdadi*, *Elizabeth L. Shriver* and *Eric H. Smith* were on the brief, for appellees, Public Broadcasting Service, et al. *Rodney F. Page* also entered an appearance for appellees, Public Broadcasting Service, et al.

Murray Drabkin was on the brief for appellee, Metropolitan Pittsburgh Public Broadcasting, Inc.

Before ROBINSON, *Chief Judge*, MCGOWAN, *Senior Circuit Judge*, and PARKER *, *United States District Judge* for the District of Columbia Circuit.

Opinion for the Court filed by *Senior Circuit Judge* MCGOWAN.

MCGOWAN, *Senior Circuit Judge*: Appellants M. B. Schnapper and the Public Affairs Press challenge the arrangements among government agencies and public broadcasters for the filming and dissemination of the television series "Equal Justice Under Law." Although the complaint states numerous legal grounds for relief, appellants' central contention is that one commissioned by the Government to create a literary or artistic work cannot obtain a copyright in that work. The District Court granted defendants' motion to dismiss. *Schnapper v. Foley*, 471 F. Supp. 426 (D.D.C. 1979). For the reasons appearing below, we affirm.

I

The complaint names five defendants who, it is alleged, had some role in the series: William E. Foley, Director of the Administrative Office of the United

* Sitting by designation pursuant to 28 U.S.C. § 292(a).

States Courts (AO), the Register of Copyrights, then Barbara H. Ringer and now David Ladd, *see* 46 Fed. Reg. 12,705 (1981), the Public Broadcasting Service (PBS), Metropolitan Pittsburgh Public Broadcast[ing], Inc., the series' producer and proprietor of television station WQED, and Greater Washington Area Educational Telecommunications Association, Inc., which broadcast part of the series over its television station, WETA.

The complaint also alleges that the contract "required" WQED to copyright the films, and to assign such copyright to the Government. Complaint, ¶ 13. At oral argument and in later correspondence, both counsel for WQED and counsel for the federal appellees stated that, although WQED did copyright the films, there was never an assignment of the copyright to the Government, and counsel for appellants has not contested the point. According to a March 20, 1981 letter sent to appellants' counsel by counsel for the federal appellees, no government agency has any copyright interest in the films. However, for the purposes of this appeal from the District Court's dismissal of the complaint under Fed. R. Civ. P. 12(b)(6), we are constrained to regard the allegations of the complaint as true, and will proceed on the assumption that an assignment took place. 5 C. Wright & A. Miller, Federal Practice and Procedure § 1358 (1969). Accord-

To put this allegation in context, we take judicial notice of certain indisputable facts. *See* Fed. R. Evid. 201(b), (c). The series, commissioned by the Judicial Conference as a bicentennial project, dramatized four cases arising in the early years of the Republic that established constitutional law principles of enduring significance: *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824);

and, in two parts, the trial of Aaron Burr. Swindler, Equal Justice Under Law, 63 A.B.A.J. 1099 (1977).

The stated goal of the project was to increase public understanding of the judicial process and to this end the films were broadcast over the PBS network in September of 1976. *Id.* The government agencies did exercise some supervision over the scripts, with a subcommittee from the judicial agencies involved reviewing the stories for "accuracy and authenticity." *Id.* at 1100.

The appellants further complain that the films were transmitted by PBS to its affiliates, including WETA, and by them broadcast without any disclosure of the government's control over their content. Complaint, ¶ 15. This, it is alleged, caused injury of an unspecified nature to the class of persons who watch WETA, a purported class whose interests appellant Schnapper states he is qualified to represent. *Id.*, ¶ 8. The nature of the injury is difficult to fathom because the class comprises not those who actually watched the programs, but anyone who ever viewed any of WETA's televised offerings, even those who never knew of the series at issue. *Id.*

In paragraph 16, the complaint asserts that the existence of the copyright severely hampers public access to the films because PBS, WQED, and the AO have refused to permit their commercial broadcast, thus injuring those who do not live within range of a public television station. Since appellant Schnapper had previously stated that he is not so situated, but rather a viewer of WETA, this purported denial of access has apparently not injured him. The injury of which appellants chiefly complain is that the copyright prevents them from publishing the text of the films. *Id.*, ¶ 17.

The complaint alleges that the defendants have violated the First and Fifth Amendments, the Property

Clause, art. IV, sec. 3, and the Copyright Clause, art. 1, sec. 8 of the Constitution, as well as the new and old Copyright Acts, 17 U.S.C. § 105 (1976), 17 U.S.C. § 8 (1970), various portions of the Communications and Public Broadcasting Acts, and "the public policy of the United States." Complaint, ¶¶ 18-19, 25, 30. The complaint seeks both injunctive and declaratory relief not only to void the copyright subsisting in "Equal Justice Under Law" but also to prevent the defendants from committing in the future acts that appellants contend are unlawful.

The District Court granted the defendants' motion to dismiss, and therefore never ruled upon the legitimacy *vel non* of the purported classes. The court held that (1) injunctive relief was not available against the sovereign, (2) the copyright law allows the copyrighting of a work commissioned by the Government, (3) there is no danger of government censorship because the stations were under no compulsion to either produce or air these films, and (4) there is no conflict between the First Amendment and copyright. *Schnapper v. Foley*, 471 F. Supp. 429 (D.D.C. 1979).

At oral argument before this court, counsel for WQED expressed the opinion that the station would be willing to permit appellants to print the text of the films. Accordingly, on February 20, 1981, this court issued an order suspending consideration of the appeal for several weeks and stating in part that,

> . . . it appearing that arguably the only significant injury in fact of which appellant Schnapper has complained was the alleged denial to him of commercial publication rights to the script . . . , and it further appearing . . . that the appellees . . . would consider granting such rights, . . . or had no control

> over them, and that counsel for all parties would promptly confer in order to explore the question of the possible availability to appellant of such rights.

The parties were unable to settle the controversy. Counsel for appellants requested WQED to waive any copyright or ownership claims it might assert not only against appellant but against any commercial television station seeking to broadcast the films. There being considerable difference between a license and a waiver of rights in a literary or artistic work, counsel for WQED stated that they had no intention of waiving its rights in "Equal Justice Under Law." After we were apprised that no settlement would be forthcoming, we were compelled to decide the legal issues of the instant case, and we do so now by affirming the District Court with respect to each question presented save that of sovereign immunity.

II

At the threshold,[1] we are confronted with the District Court's ruling that the United States and its officers, including officials of the Administrative Office of the United States Courts and the Register of Copyrights, are insulated from suit for injunctive relief by the doctrine of sovereign immunity. *Schnapper v. Foley*, 491 F. Supp. 426, 427 (D.D.C. 1979). In support of this proposition the court cited *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949).

We do not think that the District Court's application of *Larson* to the instant case can be considered correct in light of the amendments to 5 U.S.C. §§ 702 & 703

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[1] We treat other preliminary issues such as standing with reference to each of appellants' claims on the merits in Parts IV and V *infra*.

made by P.L. 94-574, 90 Stat. 2721, 94th Cong., 2d Sess. (1976). That statute enacted into law this language:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States . . . .

5 U.S.C. § 702 (1976). The legislative history of this provision could not be more lucid. It states that this language was intended "to eliminate the defense of sovereign immunity with respect to any action in a court of the United States seeking relief other than money damages and based on the assertion of unlawful official action by a Federal officer . . . ." S. Rep. No. 996, 94th Cong., 2d Sess. at 2 (1976).

After reviewing *Larson* and other leading cases, the Senate Report concluded:

> The application of sovereign immunity is so illogical that one cannot predict in what case the injustice is likely to occur.
>
> . . . .
>
> . . . [T]he time [has] now come to eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity.
>
> . . . .
>
> [When the defense is raised,] the sovereign immunity doctrine distracts the court's attention from the basic issue concerning the availability or scope of judicial review and diverts it toward sophistry and semantics.

S. Rep. No. 996 at 7-8. The clarity and force of the legislative history leaves this court with no alternative but to conclude that all questions of the amenability of a fed-

eral officer to a suit for injunctive relief must be decided with reference to section 702, not *Larson*. *Accord*, *Sea-Land Service v. Alaska Railroad*, No. 80-2097 (D.C. Cir. July 27, 1981). And section 702 retains the defense of sovereign immunity only when another statute expressly or implicitly forecloses injunctive relief. The question is therefore whether each particular law appellants assert as a basis for their suit supplies a claim for injunctive relief, and we will discuss the question *infra* only when, with respect to a particular law, there is authority to support a negative answer.[2]

III

The most plausible point of departure for considering appellants' claims on the merits lies in their assertion that the copyright laws, both old and new, do not permit the registration of works commissioned by the Government, or the subsequent assignment of copyrights subsisting therein to the Government. As the series was copyrighted in 1976 under the old Copyright Act, and appellants seek a broad injunction of future applicability under the new Act, we will decide the fate of appellants'

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[2] We may also doubt whether, even in the absence of section 702, the *Larson* case would prevent a court from awarding equitable relief on the basis of appellants' constitutional claims. The *Larson* Court was at some pains to note that injunctive relief against the sovereign could be obtained when the United States or an officer was found to have violated the Constitution:

> . . . Under our constitutional system, certain rights are protected against governmental action and, if such rights are infringed by the actions of officers of the Government, it is proper that the courts have the power to grant relief against those actions. But in the absence of a claim of constitutional limitation, [courts may not enjoin the Government].

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704 (1949).

claims with respect to both the old and new Copyright Acts.

The status of works produced pursuant to a Government commission does not present any difficult problems under the new Copyright Act. Section 105 of the new Act, 17 U.S.C. § 105 (Supp. I 1977) states in its entirety:

> Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

The statute defines a "work of the United States" as one "prepared by . . . an employee of the United States Government as part of that person's official duties." 17 U.S.C. § 101 (Supp. I 1977). It is readily observable, therefore, that the language of the new Copyright Act does not prohibit copyright protection for federally commissioned works.

Whatever doubt there may be left after reading the statute is wholly dispelled by the legislative history, which states plainly that these commissioned works may be eligible for copyright protection:

> The bill deliberately avoids making any sort of outright, unqualified prohibition against copyright in works prepared under Government contract or grant. There may well be cases where it would be in the public interest to deny copyright. . . . However, there are almost certainly many other cases where the denial of copyright protection would be unfair or would hamper the production and publication of important works.

H.R. Rep. No. 1476, 94th Cong., 2d Sess. 59 (1976). That report also states that the government agency may withhold copyright protection from the author if it would

be in the public interest to do so or if the commission is merely an alternative to producing the work in-house. *Id.*; *see also* 1 Nimmer on Copyright § 5.06[B][2] n.19.2. In this case, however, the government did not choose to withhold copyright protection from WQED.

Although section 105 explicitly allows the Government to obtain a copyright by assignment, appellants argue that section 105 does not comprehend an assignment of a federally commissioned work. They assert that this commission and assignment constitute an effort to avoid the proscription of copyright subsisting in works produced by the Government, and is therefore prohibited by the new law. In support of this analysis they cite the following passage of Professor Nimmer's treatise:

> Could the U.S. Government thus claim a copyright in a work by this indirect method which it would be precluded from claiming if the work were in the first instance made in a for hire relationship? It seems unlikely that the courts would permit such a subterfuge.

1 Nimmer on Copyright § 5.06[B][3].

Without laying down a broad rule, we are reluctant to cabin the discretion of government agencies to arrange ownership and publication rights with private contractors absent some reasonable showing of a congressional desire to do so. The legislative history noted above indicates a desire to vest the government with some flexibility in making these arrangements. The House Report provides no strong indicia of congressional intent that would lead this court to void the alleged assignment provision. It states, "The effect of section 105 is intended to place all works of the United States Government . . . in the public domain." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 59 (1976). Works of the United States were defined by section 101 to comprise works created by Government employees carrying out their official duties. Section 105,

therefore, is not necessarily subverted by assigning to the Government the copyright in a commissioned work that is neither produced by current or former employees nor related to the official duties of any Government employee, as here. Had the Government employees been detailed as consultants or employees of WQED, we might more readily find the purported assignment to be a "subterfuge," but without any such allegation we simply lack the statutory warrant to void the assignment.

The 1909 Act similarly provides no basis on which to deny copyright protection to a work commissioned by the Government or to void an alleged assignment of that work to the Government. Section 8 of the superseded Copyright Act states, in relevant part, "No copyright shall subsist . . . in any publication of the United States Government." 17 U.S.C. § 8 (1970). The applicability of that language to commissioned works was an "ambiguous" issue, according to Professor Nimmer. 1 Nimmer on Copyright § 5.06[B][2] & n.19.

This court has had occasion to determine the general issue of the scope of the governmental exception of the old Copyright Act. *Public Affairs Associates v. Rickover*, 284 F.2d 262 (D.C. Cir. 1960), *vacated for insufficient record*, 369 U.S. 111 (1962). That case was based upon an action for a declaratory judgment brought by Public Affairs Associates, Inc., doing business as Public Affairs Press, an appellant in the instant case, to establish its right to publish Admiral Rickover's speeches without the Admiral's permission. *See* 284 F.2d at 264-65. In the course of holding that the speeches of a public official composed on his own time and not written as part of his official duties may be copyrighted by that official, this court read section 8

> . . . to refer to publications commissioned or printed at the cost and direction of the United States. These

> would be authorized expositions on matters of governmental interest by governmental authority.

Id. at 268 (footnote omitted).

Appellants contend that this dictum supports their contention that federally commissioned works cannot be copyrighted under section 8. We think that the dictum is too vague to provide much guidance. A commissioned work, such as "Equal Justice Under Law," is not an exposition "by government authority," but by the creator. Therefore, it may be that the court's use of the word "commissioned" comprised only works privately printed or reproduced but created by government employees as part of their official duties or intended as statements of government policy.

Nor is the case of *DuPuy v. Post Telegram Co.*, 210 F. 2d 883 (3d Cir. 1914), dispositive. While the Third Circuit held that no copyright could be had in a work (1) commissioned by the Government and (2) published as an official Government document, the court's *ratio decidendi* depended solely upon the latter quality: "This bulletin was a public official document, one which by its public character was by statute exempted from copyright appropriation." 210 F.2d at 884.

Finally, we do not receive much assistance from *United States v. First Trust Company*, 251 F.2d 686 (8th Cir. 1958). At issue was the ownership of certain notes prepared by Captain William Clark during the Lewis and Clark expedition of 1804-05. The Eighth Circuit posed the question it saw as decisive by stating: "If Clark's notes are the written records of a government officer executed in the discharge of his official duties, they are public documents and ownership is in the United States." 251 F.2d at 688. The court, having affirmed the District Court's finding that the notes were considered private, had no reason to ascertain whether Captain Clark had

been commissioned to keep his diary by President Jefferson, Meriwether Lewis, or other government officials.

Our effort to interpret section 8 of the old Copyright Act, although not much advanced by the cases noted above, is greatly aided by a decision of this circuit holding that the legislative history of the 1976 Copyright Act may be used to interpret those provisions of the former Act that the new law was intended to reproduce. *Esquire, Inc. v. Ringer*, 591 F.2d 796, 802-03 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 908 (1979). The legislative history reveals that section 8 is one of those provisions. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 58 (1976). Therefore, the explicit legislative intent to extend copyright protection to some Government-commissioned works can be taken as indicating that section 8 did not prohibit such an arrangement.

This has also been the consistent position of the Register of Copyrights, who is charged with administering the copyright laws through the Copyright Office. That agency had consistently accepted for registration federally commissioned works under the previous Copyright Act. *See* Berger, "Copyright in Government Publications," in *Copyright Law Revision: Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Judiciary Committee*, 86th Cong., 2d Sess. 33-34 (Comm. Print 1961). The *Esquire* court also stated that the Register's interpretation of the copyright laws, if consistently applied, is entitled to considerable weight. *Esquire, Inc. v. Ringer*, 591 F.2d 796, 801 (D.C. Cir. 1978), *cert. denied*, 449 U.S. 908 (1979).

We also conclude that the alleged assignment to the Government was authorized under section 8. The provision of section 105 of the new law permitting the Government to receive a copyright by assignment was a confirmation of the existing rule announced in *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841). 1 Nimmer

on Copyright § 5.06[B][3]. Justice Story, sitting as a Circuit Justice, stated that when Congress acquired letters written by President Washington, it did not thereby place the letters in the public domain. He explained that "It might be contended, with as much force and correctness, that every private person had an equal right to use any other national property at his pleasure, such as the arms, the ammunition, the ships, or the custom houses, belonging to the government." 9 F. Cas. at 347.[3] The rule of *Folsom*, its reaffirmation in the new law, and the practice of the Copyright Office in permitting copyright to exist after assignment in these circumstances, *see* Berger, *supra*, at 34, provide ample justification for our refusal to hold that section 8 prohibited the assignment of a copyright to the government.

Informing our consideration of the statutory issues is the contention advanced by WQED that limiting the right of public broadcasters to obtain copyrights in works produced with government funds would "cripple" public television, WQED Br. at 10. The federal government spends millions of dollars to finance public television programming, and we cannot understand how, were we to void the copyright in "Equal Justice Under Law," any program produced with federal funds could obtain a copyright. It is idle to state that the harm lies not in federal

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[3] It might also be contended that this statement, and the proposition drawn from it that the United States may receive a copyright by assignment, is dictum. The United States had bought the letters from an unnamed party. The letters were sold subject to plaintiff's pre-existing copyright, which was not conveyed with the letters themselves. *See* 9 F. Cas. at 345, 347. The holding of Justice Story's opinion on the effect of congressional acquisition appears to be no more than an application of the venerable principle of property law that "[t]he vendor . . . could convey no title which he did not himself possess." *Id.* at 347. Congress did not obtain the copyright; it remained with the plaintiff, and was not extirpated by the sale of the letters to the Government. *Id.*

financing, but in federal "control" of content. Presumably a federal grant to televise *Hamlet* would be deemed an unlawful exercise of control over content if the Government indicated that it would not be satisfied by a production of *Macbeth*. If "control" is the Government's desire to get what it paid for, as here, we conceive that nothing but an unconditional grant to public broadcasting would pass the test of "control."

The public broadcasters seek copyright protection for federally commissioned works, they inform us, chiefly as a matter of economic self-interest, if not survival. We are told that the unions with which the broadcasters must negotiate would demand higher rates for production if the stations could not control subsequent commercial, and thus revenue-producing, uses. *Id.* at 10-11. We are further informed that foreign and other sales of public television programs constitute a significant source of revenue to the producing stations, *id.* at 11. We infer that the loss of this revenue would lead to requests for more government money, fewer original programs, or both.

It is against this backdrop that we evaluate appellants' claims that if the old or new copyright acts purport to allow registration for copyright of federally commissioned works, or its assignment to the government, those acts were beyond the power of the Congress to enact into law. The constitutional grant of power to Congress to pass legislation with respect to copyrights is contained in the Copyright Clause, art. I, sec. 8: "To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The appellants' argument, although not wholly clear on the point, is that the purposive language of the Copyright Clause constitutes a substantive limit on Congress's legislative power, and that it only refers to the need to provide economic incentives in the form of royalties.

There are a number of problems with appellants' position less obvious than their failure to cite any relevant authority for either proposition. Professor Nimmer apparently does not agree with the appellants' interpretation of the introductory phrase as a limitation upon congressional power: "[T]he introductory phrase, rather than constituting a limitation on Congressional authority, has for the most part tended to expand such authority." 1 Nimmer on Copyright § 1.03[B].

The Fifth Circuit, in holding that a copyright may subsist in a work judged obscene, has, we think, stated the proper scope for judicial review of challenges to congressional power based upon the supposed limits of the Copyright Clause:

> Congress has authority to make any law that is 'necessary and proper' for the execution of its enumerated Article I powers, . . . including its copyright power, and the courts [*sic*] role in judging whether Congress has exceeded its Article I powers is limited. The courts will not find that Congress has exceeded its power so long as the means adopted by Congress for achieving a constitutional end are 'appropriate' and 'plainly adapted' to achieving that end. *McCulloch v. Maryland* . . . . It is by the lenient standard of *McCulloch* that we must judge whether Congress has exceeded its constitutional powers in enacting an all-inclusive copyright statute.

Mitchell Brothers Film Group v. Cinema Adult Theater, 604 F.2d 852, 860 (5th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980). Having stated a standard for judicial review that we today endorse, the Fifth Circuit applied that standard to conclude that Congress need not "require that each copyrighted work be shown to promote the useful arts . . . ." 604 F.2d at 860. That being so, we cannot accept appellants' argument that the introductory language of the Copyright Clause constitutes a limit on congressional power. Furthermore, as our earlier discus-

sion implies, we would have serious difficulty reaching the conclusion that prohibiting copyrights in public television programs produced with government support would do much to advance the useful arts.

We have come to the conclusion that neither the old nor the new copyright law proscribes, the registration of works commissioned by the Government for copyright, and that Congress possessed the power to enact these laws. In addition, when there is no allegation that the Government and the contractor have attempted to subvert the copyright laws through an assignment subsequent to registration of a commissioned work, we find that the copyright laws, in their present as well as former incarnation, will permit such an assignment. Therefore we agree with the District Court that, with respect to the copyright laws, the appellants have failed to state a claim for which relief may be granted against the AO, WQED, PBS, and the Register of Copyrights. Since the complaint fails to allege that WETA took any action with respect to the registration or assignment of the copyright in "Equal Justice Under Law," it has, on this point, also failed as a matter of law against WETA.

IV

Appellants contend that the application of the copyright laws to works commissioned by the Government is, if authorized by Congress, violative of the First Amendment. Before analyzing the merits, if any, of their argument, we must first inquire into their standing to raise it. The complaint did not allege that the appellants were denied access to the works of a willing speaker by the existence of the copyright. Therefore, the doctrine that the First Amendment protects the right of the listener to receive information from a willing speaker would appear to have no relevance to the instant case. *See Virginia State Board of Pharmacy v. Virginia Citizens*

Consumer Council, 425 U.S. 748, 756-57 (1976); *see generally* Note, *The Right to Know in First Amendment Analysis*, 57 Tex. L. Rev. 505 (1979).

Nor can we treat the complaint's allegation that those not living within the range of a signal from a public television station are injured by the failure of defendants to make the work available to commercial broadcasters, because appellant Schnapper, according to the Complaint, lives within the area served by public television station WETA. Complaint, ¶ 8. His attempted representation of those living in areas not served by public broadcasting constitutes an assertion of the interests of third parties, and we cannot, under the standards articulated in *Singleton v. Wulff*, 428 U.S. 106 (1978), countenance this endeavor.

In *Singleton*, the Supreme Court reached the conclusion that a doctor could assert the interests of potential patients in challenging a state law forbidding the expenditure of Medicaid funds for abortions by applying standards intended as rules of decision for all claims of *jus tertii*. We are thus bound to apply them in this case. The Court first looked to determine whether the interests of plaintiff and the third party were inextricably intertwined, and found such a connection in the relationship of doctor to patient. 428 U.S. at 114-15. We find no such relationship between those who can watch public television, and those who cannot. What affects one group need not and most likely would not affect the other. Second, the Court examined whether the third party could adequately represent its own interests, and found that impecunious pregnant women were unlikely to do so. 428 U.S. at 116-17. We see no obstacle to the institution and prosecution of a civil action by the third parties in this case.

The rationale for the stringent application of the doctrine of *jus tertii* to bar most assertions of third-party

claims is also directly relevant to this litigation. The *Singleton* Court explained that *jus tertii* was based in part on the notion that "the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not." 428 U.S. at 113-14. It may be that no one other than appellants is at all concerned about the existence of a copyright in "Equal Justice Under Law," or that those to whom public broadcasting is not available have no interest in the films, or have arranged for alternative access, or even that few, if anyone, live within range of commercial, but not public broadcasting. For these reasons, we are compelled to dismiss appellants' efforts to assert the purported First Amendment interests of these third parties.

The final threshold matter is appellants' allegation of injury to itself and the purported class of viewers of WETA residing in WETA's supposed failure to show all five films in the series. We are compelled to conclude that the appellants lack standing to maintain this claim, because they have failed to allege any link between the illegal conduct alleged, which is the maintenance of the copyright, and the purported injury, which is their inability to watch the entire series on WETA.

To satisfy the constitutional requirements for standing, a plaintiff must assert that the actual or threatened injury is "a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). But appellants do not allege that WETA's failure to show the complete series was caused by its inability to do so on the basis of the copyright. In addition, the plaintiff "must always have suffered 'a distinct and palpable injury to himself' . . . likely to be redressed if the requested relief is granted." 441 U.S. at 100 (citations omitted). Once again, there is no allega-

tion, and no reason to believe, that voiding the copyright would induce WETA to air the complete series.

Appellants' surviving First Amendment claims number but two: (1) that they have a constitutional right to reprint the screenplays for commercial gain, and (2) that the defendants acted unconstitutionally in failing to disclose the extent of government involvement in the series. Neither is meritorious.

Appellants' assertion of a right to a compulsory license for the republication of the scripts in book form is presumably based upon the First Amendment, because they have not argued that any provision of the Copyright Act, either old or new, requires the compulsory licensing of copyrighted works, with certain exceptions not relevant here, *e.g.*, 17 U.S.C. §§ 111(c), 115 (Supp. I 1977).[4] Appellants do not allege whether they would pay WQED for these reprint rights, and their post-argument correspondence strongly suggests that they would not, inasmuch as they requested WQED to "waive" its copyright, rather than consider the sale of a license. However, the face of their complaint leaves open the possibility that they would pay royalties, and our analysis will proceed from the presumption that what they are asking for is a forced sale of the rights at issue.

The appellants have not indicated which First Amendment interests they feel would be served by judicial cre-

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[4] Unless there is a specific exception, we take Congress to have vested in the copyright holder the liberty not to license rights in his work. Section 201(e) of the new Act is a general prohibition against recognizing involuntary transfers except in bankruptcy, 17 U.S.C. § 201(e) (Supp. III 1979). The legislative history states: "The purpose of this subsection is to reaffirm the basic principle that the United States copyright of an individual author shall be secured to that author, and cannot be taken away by any involuntary transfer." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 123 (1976).

ation of a compulsory licensing scheme in derogation of the law of copyright as passed by Congress. We conclude that in this case, where there is no judicially cognizable allegation that the interested public has been denied access to these works, the balance of the First Amendment interests is, if anything, tilted in the direction of the holders of copyrights.

It was Chief Judge Fuld who noted that important free speech interests are served by allowing the creator of a copyrighted work to publish it as he saw fit:

> Copyright . . . rests on the assumption that there are forms of expression, limited in kind, to be sure, which should not be divulged to the public without the consent of their author. The purpose, far from being restrictive, is to encourage and protect intellectual labor . . . . The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.

Estate of Hemingway v. Random House, 23 N.Y.2d 341, 348, 244 N.E.2d 250, 255, 296 N.Y.S.2d 771, 778 (1968). We see no reason why the same freedom should not be granted to the unwilling speaker when it is a public television station. There is no question but that these noncommercial broadcasters "are fully protected by the First Amendment." *Community-Service Broadcasting v. FCC*, 593 F.2d 1102, 1110 (D.C. Cir. 1978) (en banc).

Chief Judge Fuld's statements explain why this court should not compel WQED to issue a license even if offered a royalty or other payment. The First Amendment interests to which he adverted are not based upon a desire for pecuniary gain, but upon the author's freedom to

speak or remain silent as an end in itself. The protection of the right of the speaker to remain silent has been of continuing concern to First Amendment jurisprudence. In discussing the media's right to refrain from transmitting the words of diverse parties, Professor Schmidt has stated:

> [T]he tradition of the First Amendment, and important decisions related to this tradition, define a scope for the Amendment that is not instrumental, not designed to shape the political process, and not a policy of efficiency in democratic self-governance. Against a historical perspective of religious and political autonomy required access assumes a more questionable theoretical posture.

B. Schmidt, Jr., Freedom of the Press vs. Public Access 35 (1976).[5] We therefore conclude that the liberty of WQED to grant or deny a license to appellants, either gratuitously or for compensation, does not offend either the First Amendment or its underlying values.[6]

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[5] Closely related to the author's right to remain silent is the author's right to limit the subsequent use of his work to protect his artistic reputation. This interest has been recognized by Congress in the new Copyright Act. Note, *An Author's Artistic Reputation under the Copyright Act of 1976*, 92 Harv. L. Rev. 1490 (1979). The commentator concludes:

> The 1976 Copyright Act may be interpreted to afford authors a limited right of artistic reputation in their works. By granting authors rights against the unauthorized use of their works, including failure to reproduce the work as the author created it, the Act allows an author to secure her reputation in a literary or artistic work.

Note, *supra*, at 1515. We think that this provides further support for our conclusion that the goals of the copyright law and the First Amendment do not conflict.

[6] Nothing in the preceding discussion is intended to cast any doubt upon the constitutionality of the compulsory-licensing schemes in the new Copyright Act.

For similar reasons, we are not inclined to grant appellants' request that we require public broadcasters to, in the words of the complaint, "disclose[] the existence or extent of government control of the content of the films," Complaint ¶ 15, on First Amendment grounds. The First Amendment cannot be used to force the unwilling author to speak when he would rather remain silent, as we have just explained *supra*.[7]

Underlying the appellants' First Amendment assault on the copyright obtained for "Equal Justice Under Law" is their professed concern that the Government may one day attempt to use the copyright law as an instrument of censorship. They seem to argue that if the Pentagon Papers could have been copyrighted, their publication could have been enjoined. Appellants' Br. at 35-36. We think that Justice Brennan, concurring in the Pentagon Papers case, *New York Times Co. v. United States*, 403 U.S. 713, 726 n.* (1971), put this fear to rest:

> [C]opyright cases have no pertinence here; the Government is not asserting an interest in the partic-

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[7] We could as well dismiss this allegation on standing grounds. As appellant Schnapper presumably knows who financed the films and exercised "control" over them, he is hard put to aver that he has been injured by the appellees' supposed failure to disclose. And since his knowledge presumably sets him apart from the class he purports to represent, he is both an unsuitable representative of said class and is once again attempting to assert the interests of unrelated third parties perfectly capable of protecting themselves. We note that he does not seek *more* information with respect to the various roles of the several appellees in the production of "Equal Justice Under Law," and that he has not alleged that this further information is not forthcoming from appellees. He is therefore unable to predicate standing upon an informational interest. *See* Scientists' Institute for Public Information v. AEC, 481 F.2d 1079, 1086-87 n. 29 (D.C. Cir. 1973); Note, *Informational Interests as a Basis for Standing*, 79 Colum. L. Rev. 366 (1979).

> ular form of words chosen in the documents, but is seeking to suppress the ideas expressed therein. And the copyright laws, of course, protect only the form of expression and not the ideas expressed.

We are aware that there is at least a theoretical possibility that some copyright laws may be used by some nations as instruments of censorship. Fears had been expressed, for example, that the Soviet Union would, through use of a compulsory-assignment provision in its domestic copyright laws, attempt to prevent foreign publication of dissident works whose copyright it had assumed. *See* Newcity, *The Universal Copyright Convention as an Instrument of Repression: The Soviet Experiment* in Copyright Law Symposium No. 24 (1980). The congressional response to this perceived threat was 17 U.S.C. § 201(e) (Supp. I 1977), protecting authors from involuntary transfers. *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 123 (1976); note 4 *supra*.

We are unaware, however, of any effort on the part of the United States Government to throttle free expression through use of the copyright laws, and we are not inclined to hypothesize such an effort nor to hand down a decision invalidating an act of Congress on that hypothetical basis. It is important in this regard to recall that there is no tenable allegation in this case that any person interested in viewing "Equal Justice Under Law" has been denied the opportunity to do so, or that copies of the films and their scripts are other than freely available for public inspection.

We are confident that should the day come when the Government denies someone access to a work produced at its direction on the basis of a copyright, and if the doctrine of fair use and the distinction between an idea and its expression fail to vindicate adequately that person's interests—although we have no reason to believe that they would—the courts of the United States would on

the basis of facts, not hypotheses, consider afresh the First Amendment interests implicated thereby. We are sure that they will comprehend the difference between that case and this one.

V

Appellants contend that three other legal bases support their various requests for injunctive and declaratory relief. We conclude that they do not.

Appellants' request for relief under the Public Broadcasting Act fails because that statute provides no private right of action that is available to the appellants. *Network Project v. Corporation for Public Broadcasting*, 561 F.2d 963, 972-76 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1068 (1978). Contrary to appellants' assertions, nothing in *Community-Service Broadcasting v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978) (en banc), which was a challenge mounted by broadcasters on constitutional grounds, places the holding of *Network Project* in any doubt. *See* 593 F.2d at 1109-10.

Appellants lack standing to sue under the Property Clause, art. IV, sec. 3, because they are unable to allege an injury to an interest that the Framers of the Property Clause sought to protect. The intendment of article IV, section 3, this court has held, was "to preserve both federal claims and conflicting state claims to certain portions of" unsettled lands west of the Allegheny Mountains. *Edwards v. Carter*, 580 F.2d 1055, 1059 (D.C. Cir.), *cert. denied*, 436 U.S. 907 (1978). Although the historical basis of the Property Clause may not limit congressional power to legislate with respect to it, 580 F.2d at 1059, it does serve to narrow the class of persons who can predicate standing upon the Property Clause. It has been established that taxpayer standing is never available and consumer standing unlikely to be available

to those asserting a Property Clause claim. *Public Citizen v. Sampson*, 379 F. Supp. 662 (D.D.C. 1974), *aff'd*, 515 F.2d 1018 (D.C. Cir. 1975). We think that neither an interest in the commercial republication of copyrighted material nor an interest in government disclosure is protected by the Property Clause. Appellants, unable to demonstrate injury in fact to an interest that the Property Clause arguably protects, lack standing to sue. *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 152-54 (1970). Our disposition on this preliminary ground enables us to pretermit the question of whether anyone may assert a judicially cognizable claim for relief under the Property Clause, as well as the merits, if any, of appellants' claim.

Finally, appellants may not maintain their claim on the basis of section 309(a) of the Communications Act of 1934, 47 U.S.C. § 309(a) (1976). That section vests the Federal Communications Commission with the authority and the duty to determine whether granting a broadcast license to a particular applicant would serve the public interest, convenience, and necessity. It is the law of this court that it may not determine the disposition of controversies that Congress has committed to the discretion of the FCC. *American Broadcasting Co. v. FCC*, 191 F. 2d 492, 501-02 & n.12 (D.C. Cir. 1951); *see also Scripps-Howard Radio v. FCC*, 316 U.S. 4, 14 (1942); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137-38 (1940).[8]

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[8] For other examples of judicial refusal to imply private causes of action under the Communications Act, see Daly v. CBS, 309 F.2d 83, 85-86 (7th Cir. 1962); Post v. Payton, 323 F. Supp. 799, 801-02 (S.D.N.Y. 1971); Gordon v. NBC, 287 F. Supp. 452, 455 (S.D.N.Y. 1968). *Contra*, Lorentz v. Westinghouse Electric Corp., 472 F. Supp. 946 (N.D. Pa. 1979) (suit for damages allowed under Communications Act because Commission could not award comparable relief).

The *FCC* is the exclusive forum for appellants' claims that producing and broadcasting "Equal Justice Under Law" disserved the public interest contrary to section 309(a).

VI

The judgment of the District Court from which this appeal was taken is affirmed.

It is so ordered.

APPENDIX

Opinion of The District Court
July 9, 1979

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

M. B. SCHNAPPER,
Plaintiff

v

WILLIAM E. FOLEY, et al.,
Defendants

Civil Action
No. 77-2119

OPINION

Plaintiff M. B. Schnapper, Editor of Public Affairs Press, seeks both injunctive and declaratory relief in this action. He requests an injunction which would 1) invalidate a copyright to a film series commissioned by the government, 2) prohibit future copyrights in similar works, and 3) prohibit heads of federal agencies from entering into future contracts for production of works which either call for copyrighting of such works or for any exercise of control over the contents of such works. Plaintiff also seeks a declaratory judgment that 1) all works produced with funds provided by an agency of the United States may not be copyrighted, 2) all such past, present, and future copyrights are null and void, and 3) any contract between an agency and a private party authorizing an agency or official of the United States to exercise any control over the content of any such works is null and void. Defendants are William E. Foley, Director of the Administrative Office of the United States Courts; Barbara H. Ringer, Register of Copyrights; Public Broad-

casting Service, a District of Columbia Corporation; Metropolitan Pittsburgh Public Broadcasting, Inc., Station WQED Pittsburgh, Pennsylvania; and Greater Washington Area Educational Telecommunications Association, Inc., Station WETA, Washington, D.C. The matter is before the Court on defendants' motions to dismiss.

Injunctive relief is not available against the sovereign unless statutory authority exists. The United States must give its consent to be sued, even though the suit is nominally against an officer, where the relief sought would actually be against the government. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Lloyd Wood Const. Co. v. Sandoval*, 318 F. Supp. 1167 (D. Ala. 1970). This action is in reality against the United States since the only relief sought against the federal defendants is to order them to perform or refrain from performing certain acts in their official capacities.

The United States is immune from suit except under those circumstances and conditions under which it has consented to be sued. *United States v. Testan*, 424 U.S. 392 (1976). Here plaintiff has not alleged a claim for money damages, and there is no statute authorizing an injunction against the United States. *Anderson v. United States*, 229 F. 2d 675 (5th Cir. 1956); *Larson v. Domestic & Foreign Commerce Corp., supra; Belknap v. Schild*, 161 U.S. 10 (1896). Therefore, the claims for injunctive relief must be dismissed for lack of jurisdiction.

Plaintiff contends that the copyright in issue is unlawful in that no copyright can be obtained in a work produced with the aid of government funds. 17 U.S.C. § 105 states that copyright protection is not available for any work of the United States Government. A government work is defined in 17 U.S.C. § 101 as "a work prepared by an officer or employee of the United States Govern-

ment as part of that person's official duties." *See, also, Public Affairs Associates v. Rickover*, 268 F. Supp 444 (D.D.C. 1967). However, this particular work was not created by government employees as part of their official duties. The Administrative Office of the United States Courts entered into a contract with a private party to "produce for the Judicial Conference of the United States five films about the Supreme Court entitled 'Equal Justice Under Law.' "

The legislative history of 17 U.S.C. § 105 indicates that Congress recognized there would be many of these "contract" or "commission" cases where denial of copyright protection would be unfair or hamper the publication and production of important works. It, therefore, allowed the government agency concerned to determine whether to allow an independent contractor or grantee to secure a copyright in works prepared with government funds. The House Report further provides that where a government agency commissions a work for its own use merely as an alternative to having one of its own employees prepare the work, the right to secure a private copyright would be withheld.

These films certainly were not commissioned by the Administrative Office of the United States Courts as an alternative to having one of its own employees prepare the work. That agency is not in the business of making movies. Here, as intended by Congress, the agency determined that the private parties should have a copyright in the films. Consquently, the copyright issued to the series is lawful under 17 U.S.C. § 105.

Plaintiff also argues that the copyright in question is unconstitutional because such copyrights foster government censorship. The legislative history of the copyright law shows that, on the contrary, Congress refused to

prohibit copyrights in government funded works because such a prohibition might hamper distribution. H.R. Rep. 94-1476, 94th Cong. 2d Sess. 59 (1976); Sen. Rep. 94-473, 94th Cong. 2d Sess. 56, 57 (1975). Mr. Schnapper himself testified concerning this point but Congress was not persuaded that copyrights should be denied under such circumstances. *Hearings on S. 597, before the Subcommittee on Patents and Trademarks and Copyrights of the Senate Committee of the Judiciary,* 90th Cong., 1st Sess. 646-650 (part 2) (1967). It is clear from the record that Congress did not feel that such copyrights would foster government censorship.

Plaintiff also alleges that such copyrights are unconstitutional because there is a conflict between the First Amendment and copyrights. In *Sid & Marty Krofft Television v McDonald's Corp., infra,* the Court expressly held that because copyright protects only the expression of an idea and not the idea itself there is no conflict with the First Amendment. 562 F.2d 1157 (9th Cir. 1977). The court stated that the line between "idea" and "expression of an idea" represents an acceptable definitional balance between copyright and free speech interests. *Id* at 1170. In *Robert Stigwood Group, Ltd. v O'Reilly, infra,* the Court held:

> Were the First Amendment to be applied literally, our statutes pertaining to perjury, obscenity, mail fraud among many others would fail. In the balance must be weighed the constitutional right of authors to have "the exclusive right" to their writings. 346 F.Supp 376 (D. Conn. 1972)

Therefore, it is well established that there is no conflict between the First Amendment and the copyright laws.

Finally, plaintiff contends that the agency input on the contents of the films constituted federal control of films

prepared for use on public television and violated the Constitution, citing *Community-Service Broadcasting v FCC*, (No. 76-1081, D.C. Cir. Aug. 25, 1987). These films were prepared for the Judicial Conference and not as an original television broadcast. In *Community-Service*, the challenged governmental action was a statute and regulations adopted thereunder which mandated the public television stations to make and preserve recordings of certain broadcasts. Here the challenged governmental action is a contract voluntarily entered into by both the Administrative Office of the United States Courts and the public television station involved. The purpose of the statute in *Community-Service* was to effect a form of censorship, and here the intent was the opposite — to make the films as available as possible. It is evident from the foregoing that there is no constitutional violation in this case.

Accordingly, defendants' motions to dismiss are granted.

/s/ J. Smith, Jr.

United States District Judge

Opposition

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No. 81-1215

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

M. B. SCHNAPPER,

Petitioner,

v.

WILLIAM E. FOLEY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF RESPONDENT METROPOLITAN PITTSBURGH PUBLIC BROADCASTING, INC. (WQED) IN OPPOSITION TO PETITION FOR CERTIORARI

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CONTENTS

	PAGE
Table of Authorities	i
Argument	2
1. No Important Question of Law	2
2. No Conflict Among the Circuits	6
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Banks v. Manchester, 128 U.S. 244 (1888)	3n
Callaghan v. Myers, 128 U.S. 617 (1888)	2,3n
Duchess Music Corp. v. Stern, 458 F.2d 1305 (9th Cir.), *cert. denied*, 409 U.S. 847 (1972)	7
Franklin Mint Corp. v. National Wildlife Art Exchange, Inc., 575 F.2d 62 (3d Cir.), *cert. denied*, 439 U.S. 880 (1978)	7
Funkhouser v. Loew's, Inc., 208 F.2d 185 (8th Cir. 1953), *cert. denied*, 348 U.S. 843 (1954)	7
Hoehling v. Universal City Studios, Inc., 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980)	7
Kalem Co. v. Harper Bros., 222 U.S. 55 (1911)	4n
Marbury v. Madison, 5 U.S. (1 Cranch.) 137 (1803)	6
Mazer v. Stein, 347 U.S. 201 (1954)	7
Miller v. Universal City Studios, Inc., 650 F.2d 1365 (5th Cir. 1981)	7
New York Times Co. v. United States, 403 U.S. 713 (1971)	6,7
Rubin v. Boston Magazine Co., 645 F.2d 80 (1st Cir. 1981)	7
Schnadig Corp. v. Gaines Manufacturing Company, Inc., 620 F.2d 1166 (6th Cir. 1980)	7

	PAGE
Scott v. WKJG, Inc., 376 F.2d 467 (7th Cir.), *cert. denied*, 389 U.S. 832 (1967)	7
Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977)	4n
United States v. Bodin, 375 F. Supp. 1265 (W.D. Okla. 1974)	7
Walt Disney Productions v. Air Pirates, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979)	7
Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834)	2
Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977)	7
Constitutional and Statutory References:	
United States Constitution, Article I, Section 8, Clause 8 (The Copyright Clause)	2, 3
United States Constitution, Amendment I (The First Amendment)	6
Copyright Act of 1976, §§ 101, 105, 17 U.S.C. §§ 101, 105 (Supp. I 1977)	3, 4, 5
Copyright Act of 1909, § 8, 17 U.S.C. § 8 (1970)	3, 4
Printing Law of 1895, § 52, 44 U.S.C. § 505 (1968)	4
Other References:	
H.R. Rep. No. 1476, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. Code Cong. & Ad. News 5659	3
S. Rep. No. 1473, 56th Cong., 1st Sess. (1900)	4

IN THE

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This brief is submitted on behalf of respondent, Metropolitan Pittsburgh Public Broadcasting, Inc. (WQED) (hereinafter "WQED"),* in opposition to the petition for a writ of certiorari (the "Petition") filed on behalf of petitioner M.B. Schnapper.

WQED adopts and incorporates the Statement of the Case and the Argument set forth in the Brief in Opposition of Respondents Public Broadcasting Service and Greater Washington Area Educational Telecommunications Association, Inc. (WETA) (hereinafter the "PBS Brief"). For the convenience of the Court, WQED will not repeat the points contained in the PBS Brief and will direct its Argument to matters not addressed by those respondents.

* Pursuant to Rule 28.1 of this Court, respondent states that it has no parent or affiliate companies and that its only subsidiary is wholly owned.

ARGUMENT

The Petition raises no issues worthy of certiorari. The right of an author to a copyright in artistic or literary works funded by the United States Government is guaranteed by principles long established by this Court. The decision below of the Court of Appeals for the District of Columbia Circuit is clearly correct and is consistent with the decisions of the other federal Courts of Appeals. The only issue of potential significance purportedly raised by the Petition—governmental control of public information by copyright—is not presented by this case. Accordingly, this Court should deny certiorari.

1. No Important Question of Law

The principles establishing the constitutionality of WQED's copyright in the series Equal Justice Under Law (hereinafter *"EJUL"*) were settled by this Court nearly one hundred and fifty years ago. In *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), this Court considered whether its reporter, Mr. Wheaton, had a common law copyright in his reports and remanded the case to determine compliance with the copyright statute then in effect. 33 U.S. (8 Pet.) at 667. Plainly, the Court considered the Copyright Clause (U.S. Const. Art. I, § 8, cl. 8) to be no bar to Mr. Wheaton's potential statutory copyright. As the Court said in *Callaghan v. Myers*, 128 U.S. 617 (1888):

> If this court had been of opinion that there could not have been a lawful copyright in the volumes of Wheaton's Reports, it would have been useless to send the case back to the Circuit Court for an inquiry whether the conditions precedent to the obtaining of a lawful copyright, under the act of Congress, had been complied with. . . .

> The general proposition that the reporter of a volume of law reports can obtain a copyright for it as an author, and that such copyright will cover the parts of the book of which he is the author, although he has no exclusive right in the judicial opinions published, is supported by authority. [Citations omitted].

128 U.S. at 648-49, 650. Thus, just as Mr. Wheaton was entitled to a copyright under the Copyright Clause in those portions of his reports of which he was the author, so WQED is entitled to a copyright in its original dramatization of those landmark decisions, even though both Mr. Wheaton and WQED were paid by the United States Government to create their respective works.*

The Court of Appeals applied well established principles of law in upholding WQED's copyright under the Copyright Act of 1909, in effect when the copyright was granted, and the Copyright Act of 1976, under which petitioner seeks injunctive relief. Petitioner apparently does not challenge the Court of Appeals' holding that WQED's copyright is valid under Sections 101 and 105 of the Copyright Act of 1976, 17 U.S.C. §§ 101 and 105 (Supp. I 1977). Rather, petitioner claims that the Court of Appeals erred in reaching the same result under Section 8 of the Copyright Act of 1909, 17 U.S.C. § 8 (1970). However, the applicable legislative history shows that Congress intended to incorporate the standards of Section 8 of the 1909 Act into Section 105 of the 1976 Act. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 58 (1976). The Court of Appeals correctly found that the Report's authorization of copyrights under the 1976 Act in works

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* *Callaghan v. Myers* also held that *Banks v. Manchester*, 128 U.S. 244 (1888), a case relied upon by petitioner, stood for a principle not in controversy in this case, that "there can be no copyright in the opinions of the judges, or in the work done by them in their official capacity as judges." 128 U.S. at 647.

commissioned by the Government (*Id.* at 59) makes it clear that such copyrights also were authorized under the 1909 Act. *See* Appendix to Petition (hereinafter "App.") at 13A.

In contrast to the Court of Appeals' well-reasoned decision, based on legislative history, the views of eminent commentators and a consistent interpretation of the 1909 Act by the Register of Copyrights (App. at 13A), petitioner cites only one authority to support his contention that WQED's copyright is invalid under the 1909 Act: S. Rep. No. 1473, 56th Cong., 1st Sess. 2 (1900). Petition at 10. Unfortunately for petitioner, S. Rep. No. 1473 does not refer to the Copyright Act of 1909, but rather to Section 52 of the Printing Law of 1895 (codified as 44 U.S.C. § 505), which prevented copyright in works reprinted from Government publications or printing plates. As a result, petitioner's argument is utterly inapposite and his objection to the Court of Appeals' interpretation of the 1909 Act is unfounded.*

Contrary to petitioner's assertions (Petition at 7), the copyright in *EJUL* is of great value to WQED. As noted by the Court of Appeals,

> The public broadcasters seek copyright protection for federally commissioned works, they inform us, chiefly as a matter of economic self-interest, if not survival. We are told that the unions with which the broadcasters must negotiate would demand higher rates for production if the stations could not control subsequent commercial, and thus revenue producing,

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* Petitioner's attack on the constitutionality of the Copyright Acts themselves also raises no new or important questions of law. As the Ninth Circuit, citing *Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911), recently found,

> The constitutionality of the copyright law was settled long ago by the Supreme Court.

Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157, 1169 (1977).

> uses. . . . We are further informed that foreign and other sales of public television payments constitute a significant source of revenue to the producing stations. . . . [Citations omitted].

App. at 15A. As noted by the Court of Appeals, the existence of a copyright enabled WQED to obtain a lower production cost for the series. Furthermore, by virtue of its copyright, WQED is in a position to control foreign and other sales of the series. Clearly, its copyright is of significant economic benefit to WQED—and copyrights in federally funded works are of similar benefit to other public broadcasters. In short, copyright is a beneficial concomitant to federal support of the arts.

Furthermore, even though the issue is now moot,* the Court of Appeals was plainly correct in holding that WQED could have made a valid assignment of its copyright to the Government. App. at 13A. Section 105 of the Copyright Act of 1976 provides in pertinent part:

> . . . [T]he United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

17 U.S.C. § 105 (Supp. I 1977). The Court of Appeals based its decision on the plain meaning of the relevant statute, scholarly opinion and long-standing precedent. Even if the assignment were at issue, which it is not, it would raise no new or important questions of law.

Finally, petitioner attempts to induce the Court to grant certiorari by raising the spectre of government censorship or control of public information via copyright. That issue is

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* As petitioner admits, WQED and the Government have amended their agreement to remove the provision calling for assignment of WQED's copyright to the Government. Petition at 4.

simply not in this case. Petitioner warns of government suppression of works never published (Petition at 6, 8), yet he admits that the series at issue here already has been broadcast over public television. *Id.* at 3. He fears control over the "dissemination of information about governmental activities" (*Id.* at 5), yet *EJUL* is simply the dramatization of *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137 (1803) and other early cases of this Court. By petitioner's own admission, the Government does not hold the copyright in *EJUL*, WQED does. Petition at 4. By petitioner's own admission, the Government does not oppose petitioner's proposed publication of the series. *Id.* Only a private party, WQED, opposes petitioner's proposed use of its property. The facts of this case make the petitioner's citations to *New York Times Co. v. United States*, 403 U.S. 713 (1971) irrelevant and no new or important question of law is raised.*

2. No Conflict Among the Circuits

No other federal Court of Appeals has addressed the issue of whether a government contractor can obtain a copyright in works funded by the United States, and therefore, there is no conflict with regard to the other Courts of Appeals' decisions in this matter.

In its resolution of petitioner's First Amendment claims, the D.C. Circuit is in complete harmony with the other Circuits. Not only did the Court properly deny petitioner standing, as discussed in the PBS Brief at 3, but it correctly

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* Justice White (joined by Justice Stewart), concurring in the result in *New York Times Co. v. United States*, clearly distinguished private enforcement of copyright from Government suppression of information:

> [W]hen the press is enjoined under the copyright laws, the complainant is a private copyright holder enforcing a private right. These situations are quite distinct from the Government's request for an injunction against publishing information about the affairs of government, a request admittedly not based on any statute.

403 U.S. at 731 n.1.

found, on the merits, that there is no conflict between WQED's copyright in *EJUL* and petitioner's First Amendment right to discuss the ideas contained therein. App. at 23A-24A. As Justice Brennan has noted,

> [T]he copyright laws, of course, protect only the form of expression and not the ideas expressed.

New York Times Co. v. United States, 403 U.S. 713, 726n. (1971). *Accord, Mazer v. Stein*, 347 U.S. 201, 217 (1954).

Every Court of Appeals to consider the question has adopted the "idea/expression" dichotomy. *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1368 (5th Cir. 1981); *Rubin v. Boston Magazine Co.*, 645 F.2d 80, 82 (1st Cir. 1981); *Schnadig Corp. v. Gaines Manufacturing Co., Inc.*, 620 F.2d 1166, 1168 n.3 (6th Cir. 1980); *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 978 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980); *Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979); *Franklin Mint Corp. v. National Wildlife Art Exchange, Inc.*, 575 F.2d 62, 64 (3d Cir.), *cert. denied*, 439 U.S. 880 (1978); *Scott v. WKJG, Inc.*, 376 F.2d 467, 469 (7th Cir.), *cert. denied*, 389 U.S. 832 (1967); *Funkhouser v. Loew's, Inc.*, 208 F.2d 185, 189 (8th Cir. 1953), *cert. denied*, 348 U.S. 843 (1954).

The copyright in *EJUL* does not suppress any ideas or the discussion of issues. It prevents only the piracy of WQED's intellectual labors. As several courts have held, there is no "right to copy". *Duchess Music Corp. v. Stern*, 458 F.2d 1305, 1310 (9th Cir.), *cert. denied*, 409 U.S. 847 (1972); *United States v. Bodin*, 375 F. Supp. 1265 (W.D. Okla 1974); *cf. Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 577 n.13 (1977). Accordingly, the Court of Appeals' decision regarding the relationship between WQED's copyright and petitioner's First Amendment rights is not in conflict with the decision of any other Circuit and should be left undisturbed.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Dated: February 8, 1982

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Opposition

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Office - Supreme Court, U.S.
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No. 81-1215

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BRIEF IN OPPOSITION OF RESPONDENTS PUBLIC BROADCASTING SERVICE AND GREATER WASHINGTON AREA EDUCATIONAL TELECOMMUNICATIONS ASSOCIATION, INC.

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TABLE OF CONTENTS

	Page
Statement Regarding Corporate Ownership	1
Statutes and Constitutional Provisions Involved	1
Statement of the Case	2-4
Argument	4-6
Conclusion	7

TABLE OF AUTHORITIES

Cases

Esquire, Inc. v. Ringer, 591 F.2d 796 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 908 (1979)	5
Forsham v. Harris, 445 U.S. 169 (1980)	6
Graham v. John Deere Co., 383 U.S. 1 (1966)	6
Singleton v. Wulff, 428 U.S. 106 (1978)	3

Constitutional Provisions

United States Constitution, Article I, Section 8	3
United States Constitution, Amendment I	3

Statutes

Copyright Act of 1976, § 101, 17 U.S.C. §101 (Supp. I 1977)	1, 5
Copyright Act of 1976, § 105, 17 U.S.C. § 105 (Supp. I 1977)	4
Copyright Act of 1909, § 8, 17 U.S.C. § 8 (1970)	4
Freedom of Information Act, 5 U.S.C. § 552	6

Other

H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976)	5
Swindler, *Equal Justice Under Law*, 63 A.B.A.J. 1099 (1977)	2

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BRIEF IN OPPOSITION OF RESPONDENTS PUBLIC BROADCASTING SERVICE AND GREATER WASHINGTON AREA EDUCATIONAL TELECOMMUNICATIONS ASSOCIATION, INC.

STATEMENT REGARDING CORPORATE OWNERSHIP

Pursuant to Rule 28.1 of the Rules of the United States Supreme Court, Respondents Public Broadcasting Service and Greater Washington Area Educational Telecommunications Association, Inc. state that each is an independent corporation with no parent, subsidiaries, or affiliates.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the statutes and constitutional provisions set forth in the Petition, this case involves Section 101 of the 1976 Copyright Act, 17 U.S.C. § 101:

> A "work of the United States" is a work prepared by an officer or employee of the United States Government as part of that person's official duties.

STATEMENT OF THE CASE

This case concerns a film series titled "Equal Justice Under Law." The series details early Supreme Court decisions that "established constitutional law principles of enduring significance." App. to Petition, at 3A. The goal was "to increase public understanding of the judicial process." *Id.* at 4A. The Administrative Office of the United States Courts (AO) funded the series, and it reviewed the resulting stories for "accuracy and authenticity." *Id.* at 4A, *quoting* Swindler, *Equal Justice Under Law*, 63 A.B.A.J. 1099, 1100 (1977).

The film series was produced by Respondent Metropolitan Pittsburgh Public Broadcasting, Inc. (WQED) and distributed by Respondent Public Broadcasting Service (PBS) to its member stations. Respondent Greater Washington Area Educational Telecommunications Association, Inc. (WETA), a PBS member station, broadcast some of the programs in the series. "Equal Justice Under Law" was copyrighted by WQED, which presently holds the copyright, although its original contract with the AO provided for assignment of the copyright to the United States. App. to Petition, at 3A.

In the court below, Petitioner M. B. Schnapper claimed that the "copyright prevents [him] from publishing the text of the films," *id.* at 4A; he therefore sought to void the "Equal Justice Under Law" copyright and to enjoin the future issuance of similar copyrights.[1] Petitioner's "central contention is that one commissioned by the Government to create a literary or artistic work cannot obtain a copyright in that work." *Id.* at 2A. The district court rejected that contention and dismissed the complaint; the court of appeals affirmed.

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[1] Mr. Schnapper is associated with the Public Affairs Press, one of the original plaintiffs in this action. The Public Affairs Press is no longer a party.

The appellate court held that neither the Copyright Act of 1909, under which the challenged copyright issued, nor the Copyright Act of 1976, under which Petitioner seeks injunctive relief, prevented the copyrighting of works commissioned and funded by the Government. That result, the court held, was compelled by the plain language of the statutes, their legislative history, prior judicial decisions, and the consistent and long-standing interpretation of both statutes by the Register of Copyrights. *See* App. to Petition, at 8A-14A. The court noted that acceptance of Petitioner's position could "cripple" public television: "we cannot understand how, were we to void the copyright in 'Equal Justice Under Law,' any program produced with federal funds could obtain a copyright." *Id.* at 14A. The resulting loss of revenue "would lead to requests [by public television] for more government money, fewer original programs, or both." *Id.* at 15A. For these reasons, the court held that permitting "Equal Justice Under Law" to be copyrighted was consistent with the Copyright Clause of the Constitution, which grants Congress the power to issue patents and copyrights "[t]o promote the Progress of Science and the Useful Arts." U.S. Const., Art. I, § 8. App. to Petition, at 16A-17A.

The court of appeals also rejected Petitioner's First Amendment claims. At the outset, the court held that Petitioner had no standing to assert the right of listeners to access to the film series, since he himself did not lack access. In so holding, the court simply applied established principles of third-party standing exemplified by this court's decision in *Singleton v. Wulff*, 428 U.S. 106 (1978).

Petitioner's claimed First Amendment right to a compulsory license was also denied. The court noted that the First Amendment protects the right to remain silent as well as the right to speak. *See* App. to Petition, at 20A-22A. It also refused to credit Petitioner's concern,

reiterated in the Petition for Certiorari, that the Government *might* use the copyright law to "throttle free expression." *Id.* at 24A. That court found no danger to free speech in allowing federally funded literary or artistic works to be copyrighted, and it was confident that if a true misuse case were to occur, "the courts of the United States would . . . comprehend the difference between that case and this one." *Id.* at 24A-25A.

ARGUMENT

The Petition presents no important issue warranting review by this Court. The court of appeals correctly held that neither the Constitution nor statutory law prohibits the copyrighting of literary or artistic works prepared with Government financial support. Petitioner has established no error in the decision below and has cited no authority that fairly supports his contention, either in this Court or the lower federal courts. Instead, Petitioner discusses hypotheticals—creations of his imagination without relevance in the factual context of this case. The heart of Petitioner's argument is that this Court should make a sweeping pronouncement on copyright law based upon conduct that has not taken place and is not threatened. The court of appeals correctly rejected that argument, and the Petition for a Writ of Certiorari should accordingly be denied.

(1) The relevant statutory principles are concisely and plainly analyzed in the opinion of Judge McGowan for the District of Columbia Circuit. That opinion demonstrates that copyright protection has long been available for literary and artistic works funded by the Government but produced by independent contractors. Thus, both the 1909 Copyright Act and the 1976 Copyright Act only prohibited copyright protection for "works of the United States."[2] The 1976 Act specifically defined the

[2] The quoted language is from the 1976 Copyright Act, 17 U.S.C. § 105 (Supp. I 1977). The 1909 Act, 17 U.S.C. § 8 (1970), referred to "any publication of the United States."

phrase "works of the United States" as those "prepared by an officer or employee of the United States Government as part of that person's official duties." 17 U.S.C. § 101 (Supp. I 1977).[3] The Act's legislative history confirms that the definition excludes works prepared under Government contract:

> The bill deliberately avoids making any sort of outright unqualified prohibition against copyright in works prepared under Government contract or grant. There may be cases where it would be in the public interest to deny copyright . . . . However there are almost certainly many other cases where the denial of copyright protection would be unfair or would hamper the production and publication of important works.

App. to Petition, at 9A, *quoting* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 59 (1976).

Congress, in short, decided that Government agencies should be free to permit their grantees to obtain copyrights in works produced with federal funds. Nowhere is the good reason for that judgment more apparent than in the production of literary and artistic works for public television, such as "Equal Justice Under Law." As Judge McGowan noted, it would be difficult to conclude that "prohibiting copyrights in public television would do much to advance the useful arts." App. to Petition, at 17A. Copyright helps to preserve the viability of public television and this benefit, in turn, advances the principles of free speech, for public television provides a forum for experimental artistry and unpopular viewpoints. Copyright also insures the availability of innovative and creative talent by protecting artistic efforts against piracy, misuse or misappropriation.

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[3] This definition codified the long-standing practice of affording copyrights to Government grantees. *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 58 (1976). *See generally, Esquire, Inc. v. Ringer*, 591 F.2d 796, 802-03 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 908 (1979).

The decision of the court of appeals is thus consistent with *Graham v. John Deere Co.*, 383 U.S. 1 (1966). Even assuming that the introduction to the Copyright Clause limits Congress's ability to allow copyright protection, Congress did not exceed those limits by allowing the copyrighting of governmentally funded artistic and literary works, for that protection does "Promote the Progress of Science and the Useful Arts."

(2) Contrary to Petitioner's contention, the decision below is also consistent with this Court's recent opinion in *Forsham v. Harris*, 445 U.S. 169 (1980), construing the definition of "agency records" in the Freedom of Information Act, 5 U.S.C. § 552.[4] In *Forsham*, Appellants sought access to raw data produced by a Governmment grantee in a study of antidiabetic drugs. The data had formed the basis of a published report that ultimately led to a decision by the Food and Drug Administration to withdraw its approval for certain antidiabetic drugs. This Court held that the grantees' data were not agency records within the meaning of the FOIA.

The *Forsham* court ruled that Congress had excluded private grantees from the definition of "agency," and that this exclusion was "consistent with [Congress's] prevalent practice of preserving grantee autonomy." *Id.* at 179. Thus, far from constituting a "radical extension" of *Forsham* (see Petition, at 5), the decision below rests on precisely the same point of statutory interpretation. Each case affirms the congressional policy of treating Government grantees differently from federal employees, a policy implemented in the language of both the Copyright Act and FOIA and explained in their legislative histories. Congress's effectuation of that policy accords with accepted constitutional principles, as the court of appeals held.

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[4] Petitioner's argument on *Forsham* is not only without merit, it was never presented to either the district court or the court of appeals.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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February 1982